(6)

No. 85-1835

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE STATES OF CALIFORNIA, ALABAMA, FLORIDA, ILLINOIS, INDIANA, KENTUCKY, MISSISSIPPI, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, VIRGINIA, WASHINGTON, WISCONSIN, WYOMING

JOHN K. VAN DE KAMP,
Attorney General of California
STEVE WHITE
Chief Assistant Attorney General
THOMAS A. BRADY, Supervising
Deputy Attorney General
LAURENCE K. SULLIVAN,
Assistant Supervising Deputy
Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-3653

Counsel for Amici Curiae

33 pp

Charles A. Graddick
Attorney General of Alabama
Office of the Attorney General
11 South Union
Montgomery, Alabama 36130

Jim Smith
Attorney General of Florida
Office of the Attorney General
The Capitol
Tallahassee, Florida 32304

Neil F. Hartigan
Attorney General of Illinois
Office of the Attorney General
100 W. Randolph St., 12th Floor
Chicago, Illinois 60601

Linley E. Pearson
Attorney General of Indiana
Office of the Attorney General
219 State House
Indianapolis, Indiana 46204

David L. Armstrong
Attorney General of Kentucky
Office of the Attorney General
The Capitol
Frankfort, Kentucky 40601

Edwin Lloyd Tittman
Attorney General of Mississippi
Office of the Attorney General
P.O. Box 220
Jackson, Mississippi 39205

Nicholas J. Spaeth
Attorney General of North Dakota
Office of the Attorney General
State Capitol
Bismarck, North Dakota 58505

Leroy S. Zimmerman
Attorney General of Pennsylvania
Office of the Attorney General
1634A Strawberry Square, 15th Floor
Harrisburg, Pennsylvania 17120

T. Travis Medlock
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Mary Sue Terry
Attorney General of Virginia
Office of the Attorney General
101 N. 8th Street, 5th Floor
Richmond, Virginia 23219

Kenneth O. Eikenberry
Attorney General of Washington
Office of the Attorney General
Temple of Justice
Olympia, Washington 98504

Bronson LaFollette
Attorney General of Wisconsin
Office of the Attorney General
P.O. Box 7857
Madison, Wisconsin 53707

A.G. McClintock
Attorney General of Wyoming
Office of the Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

TOPICAL INDEX

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
AN INDIVIDUAL'S TRASH PLACED OUTSIDE THE CURTILAGE FOR COLLECTION OR REMOVED FROM THE CURTILAGE BY THE AUTHORIZED COLLECTOR IS NOT PROTECTED FROM GOVERNMENTAL EXAMINATION BY THE FOURTH AMENDMENT	5
A. No Subjective Privacy Expectation In Trash Is Exhibited When It Is Placed Outside The Curtilage Or Removed From The Curtilage By An Authorized Collector. Nor Is Any Such Expectation Reasonable.	5
B. Arguments Offered For A Legitimate Privacy Expectation In Trash Placed For Collection Outside The Curtilage Are Not Consistent With The Fourth Amendment.	11
CONCLUSION	24

TABLE OF AUTHORITIES

	Page
Abel v. United States 362 U.S. 217 (1960)	21
Ball v. State 57 Wis.2d 653 205 N.W.2d 353	10
Bolen v. State 544 S.W.2d 918 (Tenn. Crim. 1976)	10
California v. Ciraolo 476 U.S. __ 90 L.Ed.2d 210 106 S.Ct. 1809 (1986)	14
California Reduction Co. v. Sanitary Reduction Works 199 U.S. 306 (1905)	18
Croker v. State 447 P.2d 122 (Wy. 1970)	9
Everhart v. State 274 Md. 459 337 A.2d 100 (1975)	9
Fixel v. Wainwright 492 F.2d 480 (5th Cir. 1974)	9
Hester v. United States 265 U.S. 57 (1924)	21
Hoffa v. United States 385 U.S. 293 (1966)	8
Katz v. United States 389 U.S. 347 (1967)	2
Lewis v. United States 385 U.S. 206 (1966)	8

TABLE OF AUTHORITIES (Continued)

	Page
Magda v. Benson 536 F.2d 111 (6th Cir. 1976)	18
Oliver v. United States 466 U.S. 190 (1984)	11
People v. Edwards 71 Cal.2d 1096 80 Cal.Rptr. 633 (1969)	11
People v. Krivda 5 Cal.3d 357, 96 Cal.Rptr. 68 (1971) remanded, 409 U.S. 33 (1972) cert. den. 412 U.S. 919 (1973)	9
People v. Rooney 175 Cal.App.3d 634 (1985)	7
Rakas v. Illinois 439 U.S. 128 (1978)	19
Smith v. Maryland 442 U.S. 735 (1979)	5
State v. Broom 113 Ariz. 495 557 P.2d 1052 (1976)	9
State v. Brown 20 Ohio App.3d 36 484 N.E.2d 215 (1984)	19
State v. Chapman 250 A.2d 203 (Maine 1969)	9
State v. Purvis 249 Ore. 404 438 P.2d 1002 (1968)	9

TABLE OF AUTHORITIES (Continued)

	Page
State v. Stevens 123 Wis.2d 303 (1985) cert. den. __ U.S. __ 88 L.Ed.2d 125, 106 S.Ct. 151 (1985)	8
United States v. Biondich 652 F.2d 743 (8th Cir. 1981) cert. den. 454 U.S. 975 (1981)	8
United States v. Cruz Pagan 537 F.2d 554 (1st Cir. 1976)	10
United States v. Dzialak 441 F.2d 212 (2d Cir. 1971)	18
United States v. Jacobsen 466 U.S. 109 (1984)	23
United States v. Kramer 711 F.2d 789 (7th Cir.) cert. den. 464 U.S. 962 (1983)	12
United States v. O'Bryant 775 F.2d 1528 (11th Cir. 1985)	7
United States v. Reicherter 647 F.2d 397 (3d Cir. 1981)	21
United States v. Ressler 536 F.2d 208 (7th Cir. 1976)	8
United States v. Shelby 573 F.2d 971 (1978) cert. den. 439 U.S. 841 (1978)	8
United States v. Stanley 597 F.2d 866 (4th Cir. 1979)	10
United States v. Terry 702 F.2d 299 (2d Cir.) cert. den. 461 U.S. 931 (1983)	12

TABLE OF AUTHORITIES (Continued)

	Page
United States v. Thornton 746 F.2d 39 (D.C. Cir. 1984)	7
United States v. Vahalik 606 F.2d 99 (5th Cir. 1979)	19
United States v. White 401 U.S. 745 (1971)	8
Work v. United States 243 F.2d 660 (D.C. 1957)	9
7 McQuillan, Municipal Corporations p. 96	18

No. 85-1835

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

INTEREST OF AMICI CURIAE

This case presents a significant issue respecting the Fourth Amendment's application. At issue is whether the California court's constitutional distinction between police and others, such as garbage collectors, who examine trash set out for collection, is to be adopted by this Court. That approach calls into

question continued adherence to Katz v. United States, 389 U.S. 347 (1967) since it eliminates the need to exhibit an actual expectation of privacy in order to assert the Fourth Amendment's protection.

The Amici States have a direct interest in the resolution of this issue in view of its broad implications for a wide variety of search and seizure cases.

In addition, adoption of the California court's limitation on trash examination could lead to confusion among officials as to the sorts of garbage protected and a loss of confidence by the public in the ability of local law enforcement officers to carry out their duties in an appropriate manner.

This brief is filed pursuant to Rule 36.4 of the Court.

///

///

///

///

SUMMARY OF ARGUMENT

The California Court of Appeal erred by abandoning the requirement that a person exhibit an actual expectation of privacy in the object of a claimed search as the threshhold test for Fourth Amendment protection.

Moreover, it incorrectly viewed respondent's asserted privacy expectation as reasonable, even though respondent placed his trash outside the curtilage for collection, manifesting his obvious intent to permanently disassociate himself from it and a desire for the government to actually take it. Respondent dispossessed himself of control over who could view his trash and failed to take obvious measures against its connection to him becoming known.

Distinctions between examination of trash by the garbage collector on one hand and trained police seeking evidence of crime on the other hand are inconsistent with this Court's precedent. Moreover,

the rule followed by the lower court, which depends upon whether trash has lost its "identity," violates the basic principle that the legality of challenged police actions does not turn upon their fruits.

It is precisely because garbage cans are not where we keep valued things that they lack association with personal privacy except in the home or curtilage as an adjunct of the family economy. Trash placed for collection outside the curtilage, or removed from the curtilage by the authorized collector, passes into a sphere where access by others is uncontrolled and privacy expectations in castaway property evaporate.

///

///

///

///

///

///

///

ARGUMENT

AN INDIVIDUAL'S TRASH PLACED OUTSIDE THE CURTILAGE FOR COLLECTION OR REMOVED FROM THE CURTILAGE BY THE AUTHORIZED COLLECTOR IS NOT PROTECTED FROM GOVERNMENTAL EXAMINATION BY THE FOURTH AMENDMENT

A. No Subjective Privacy Expectation In Trash Is Exhibited When It Is Placed Outside The Curtilage Or Removed From The Curtilage By An Authorized Collector. Nor Is Any Such Expectation Reasonable.

A protected privacy interest exists under the Fourth Amendment if the individual exhibits an actual expectation of privacy in a particular thing and society is prepared to recognize that expectation as reasonable. See Smith v. Maryland, 442 U.S. 735, 740 (1979), quoting, Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

When a person places trash outside the curtilage in an area immediately accessible to outsiders for it to be collected, the individual loses control over access to the deposited item by uninvited persons, and manifests an intent that government or its

agents take permanent possession of that property.

Whatever expectation people have respecting whether such trash will be maintained inviolate the inability to exclude others and the implicit renouncement of any desire to retain those things is counter to the very concept of manifesting desired privacy.

Exhibiting privacy expectations is required to ensure that the Fourth Amendment is not trivialized by extending protection to purely abstract or theoretical interests as well as to give police notice of claimed privacy to prevent unjustified intrusions in advance.

The California Court of Appeal abandoned any pretense of obedience to the first requirement of Katz. For this most basic of reasons, the court erred.[1]/

---

1. The court dealt exclusively with the second prong of Katz by characterizing the issue as being "the

Even assuming arguendo that a privacy interest was exhibited, society does not recognize as reasonable expectations of privacy from government in trash placed for collection outside the home and curtilage thereof. Indeed the "overwhelming weight of authority rejects" the conclusion drawn by the California Court of Appeal. United States v. O'Bryant, 775 F.2d 1528, 1533 (11th Cir. 1985), quoting, United States v. Thornton, 746 F.2d 39, 49 & n. 11 (D.C. Cir. 1984). If a legitimate privacy expectation were found here, it can be argued with great force that trash bags in a curbside garbage can on a city street are equally protected.

However, even when garbage is placed for collection in the curtilage, e.g., on a back porch, once the authorized collector

---

reasonableness of defendant's expectation of privacy in a bag of trash placed in a communal trash bin located in the apartment's garage, an area accessible to the public." People v. Rooney, 175 Cal.App.3d 634, 641-642, 221 Cal.Rptr. 49, 53 (1985).

removes it from the immediate surroundings of the home, with the owner's implied permission, trash simply is no longer private information absent perhaps special arrangements with the collector to keep it from public view. Consequently, the garbage's original owner takes the risk that it may be conveyed to police.2/ United States v. Biondich, 652 F.2d 743, 745 (8th Cir.), cert. denied, 454 U.S. 975 (1981); United States v. Shelby, 573 F.2d 971, 973-974 (7th Cir.), cert. denied, 439

---

2. At most, the garbage collector in such a case is ". . . no different than an undercover agent for the state and 'an entry by an undercover agent is not illegal if he entered for the "very purposes contemplated by the occupant."' United States v. Ressler, 536 F.2d 208, 211 (7th Cir. 1976), quoting, Lewis v. United States, 385 U.S. 206, 211 (1966)." State v. Stevens, 123 Wis.2d 303, 367 N.W.2d 788, 794-795 cert. denied, __ U.S. __, 88 L.Ed.2d 125, 106 S.Ct. 151 (1985); see also United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion); Hoffa v. United States, 385 U.S. 293, 302 (1966). Placing information in an envelope, a box or a trash bag before conveying it to a trash collector clearly does not change the individual's misplaced confidence in that person.

U.S. 841 (1978); see also State v. Purvis, 249 Ore. 404, 438 P.2d 1002 (1968); Croker v. State, 447 P.2d 122 (Wyoming, 1970).

Except in California, People v. Krivda, 5 Cal.3d 357, 96 Cal.Rptr. 68, 486 P.2d 1262 (1971), remanded, 409 U.S. 33 (1972), on remand, 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457, cert. denied, 412 U.S. 919 (1973), courts finding the Fourth Amendment violated with respect to trash have done so strictly in the context of an uninvited police entry into the curtilage without consent, or other justification. Fixel v. Wainwright, 492 F.2d 480, 483-484 (5th Cir. 1974) (fenced backyard of apartment building); Work v. United States, 243 F.2d 660, 662 (D.C. Cir. 1957) (underneath home's porch); State v. Broom, 113 Ariz. 495, 557 P.2d 1052, 1054 (1976) (fifteen feet behind home in place not open to garbage collector); State v. Chapman, 250 A.2d 203, 212 (Maine 1969) (inside garage under home); Everhart v.

State, 274 Md. 459, 337 A.2d 100, 114-115 (1975) (apparent farmhouse yard; remanded for determination); Bolen v. State, 544 S.W.2d 918, 920 (Tenn. Crim. 1976) (private area of home adjacent to private driveway); Ball v. State, 57 Wis.2d 653, 205 N.W.2d 353, 355-358 (1973) (home's backyard).

Respondent was faced with no such invasion of his home's privacy. The California Court of Appeal found the subterranean garage of respondent's apartment building was outside his curtilage, where he might enjoy a heightened expectation of privacy from uninvited police. People v. Rooney, 175 Cal.App.3d at 645, 221 Cal.Rptr. at 56.

Access to such garages is not controlled by individual tenants unlike the separate assigned areas where they enjoy exclusive privacy. United States v. Cruz Pagan, 537 F.2d 554, 557-558 (1st Cir. 1976); see also United States v. Stanley, 597 F.2d 866, 870 (4th Cir. 1979) (parking

lot of mobile home park not curtilage). Moreover, such communal garages are for use by anyone with business on the premises who, like the police, choose to enter the driveway. See Clerk's Transcript: 29. The garage was not a place associated with the "sanctity of a man's home and the privacies of life." Oliver v. United States, 466 U.S. 170, 180 (1984).

B. Arguments Offered For A Legitimate Privacy Expectation In Trash Placed For Collection Outside The Curtilage Are Not Consistent With The Fourth Amendment

The primary argument offered for a legitimate private expectation in trash set out for collection is the bare assertion that residents do not want castaway papers and effects examined by others. People v. Rooney, 175 Cal.App.3d at 641-642, 221 Cal.Rptr. at 53, quoting, People v. Edwards, 71 Cal.2d 1096, 1104, 80 Cal.Rptr. 633, 638, 458 P.2d 713, 718 (1969).

However, "once the trash is discarded

the former owner rarely has any further interest in it other than to be assured that it will not remain at his doorstep. In the rare instance when he desires to preclude inspection by others of private papers in his garbage he may do so by first shredding or burning them or by hand-delivering the papers to a garbage-grinding machine." United States v. Terry, 702 F.2d 299, 309 (2d Cir.), cert. denied, 461 U.S. 931 (1983).

A person like respondent, who places trash out for collection intact is an individual who has failed to take even the most obvious and readily available measures to keep their connection to himself private. "There is nothing unfair about requiring that people not discard things they want to keep secret, or destroy them before they do." United States v. Kramer, 711 F.2d 789, 792 (7th Cir.), cert. denied, 464 U.S. 962 (1983).

It is also claimed that people

anticipate "nonpolice third persons may rummage through and scavenge from one's trash barrels despite local ordinances prohibiting such behavior," People v. Rooney, 175 Cal.App.3d at 642, 221 Cal.Rptr. at 53, but that the probability of such occurrence does not create an expectation by individuals that police will rummage and retrieve evidence from trash. Ibid., citing, People v. Krivda, 5 Cal.3d 357, 366-367, 96 Cal.Rptr. 62, 68-69, 486 P.2d 1262, 1268-1269 (1971). The argument is that placing trash in a public area for collection is not "necessarily an abandonment of one's trash to the police or general public." Id. at p. 366, 96 Cal.Rptr. at 68, 486 P.2d at 1268. Rather, the trash is abandoned only to "persons authorized to remove the receptacle's contents, such as trash men." People v. Edwards, 71 Cal.2d at 1104, 80 Cal..Rptr at 638, 458 P.2d at 718. It is only when trash is commingled to the point of losing

its "identity" that individuals lack an expectation of privacy as against police in their garbage. Ibid; People v. Krivda, 5 Cal.3d at 366-367, 96 Cal.Rptr. at 68-69 486 P.2d at 1268-1269.

This kind of distinction between police and third persons, was repudiated last Term in California v. Ciraolo 476 U.S. __, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986). There the Court was confronted with the argument that police aerial observation of a fenced backyard was a search because the flight was specifically directed at identifying marijuana by police officers who were trained to recognize such crops from airplanes. Characterizing those facts as "irrelevant", this Court noted: "Such observation is precisely what a judicial officer needs to provide a basis for a warrant." 476 U.S. at ___, 90 L.Ed.2d at 217, 106 S.Ct. at 1813.

"[A] person has no legitimate expectation of privacy in information he

voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. at 743-744. There is no reason to suppose that legitimate expectations of privacy subsist in trash placed in publicly accessible areas for the garbage collector.

To begin with, garbage disposal is generically governmental. It is undertaken by public employees or private industry by licensing. Moreover, unlike the mail, government or its agents are both the deliverer, and, almost always, the final intended recipient of trash. What is more, government and its agents are widely and approvably engaged in examining trash--frequently before it loses its "identity." Government must ensure compliance with size and weight limitations on disposable material; segregate reusable or nonputrescible items; and remove toxic or other dangerous matter.

Absolutely no evidence exists that individuals expect the government not to

examine trash from which the original owners obviously intend to permanently disassociate themselves and which they just as obviously intended for the government to actually take. As noted, government routinely does examine trash. That police have reasons different from sanitation workers for the examination is not a distinction of constitutional magnitude. California v. Ciraolo, supra.

Nor does the Fourth Amendment legitimate expectations of privacy in trash set out for collection based upon local ordinances that prohibit unlicensed persons collecting from or tampering with trash containers. Compare People v. Krivda, 5 Cal.3d at 366, 96 Cal.Rptr. at 68, 486 P.2d at 1268.

First, such ordinances do not restrict a licensed collector from conveying trash to police after regular collection but before loss of the trash's "identity." Police neither collect from nor tamper with

trash containers when garbage is examined somewhere else, e.g., the well of a garbage truck.3/

Second, it is government which decides whether to license trash collecting by third parties and regulates with almost complete independence how collection is made. It is hardly reasonable to believe licensees acquire collection rights which garbage owners rely upon to secure privacy of their trash. Unless this Court was prepared to hold that the Fourth Amendment is balkanized into so many discrete units according to each municipality's collection

---

3. In practical terms, acceptance of an expectation of privacy in respondent's apartment building trash bin would mean officers merely would wait for the trash collector to collect and examine the trash in the garbage well of the truck. "It is not easy to see how such a requirement would advance legitimate privacy interests." Oliver v. United States, 466 U.S. at 179, n.9. We assume therefore that respondent's argument rests on the broader Krivda theory that the Constitution affirmatively prohibits police from standing at the garbage collector's elbow as identifiable trash is revealed in the collection process.

system, it could not possibly make any difference what collection scheme was chosen. See Magda v. Benson, 536 F.2d 111, 113 (6th Cir. 1976) (trash ordinance a matter of local not constitutional law); United States v. Dzialak, 441 F.2d 212, 213 (2d Cir.) (trash ordinance does not affect abandonment), cert. denied, 412 U.S. 919 (1973).

Third, this Court has recognized that public health considerations underlie local ordinances regulating disposal and destruction of garbage and other refuse. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 316-317, 319-324 (1905). Additionally such ordinances are "typically enacted to protect the exclusive right of a city or its authorized agent to collect the trash. (See 7 McQuillan, Municipal Corporations, p. 96, § 251, and cases cited therein.)" People v. Krivda, 5 Cal.3d at 368, n.1, 96 Cal.Rptr. at 69, 486 P.2d at 1269 (Wright,

C.J., dissenting.)

One court has remarked in upholding police collection of garbage bags from the curb fronting an apartment building:

> "In our estimation, it is unreasonable to suggest that the intent in passing the ordinance [prohibiting removal of trash from the street except with the owner's consent] was to impede law enforcement authorities in the performance of otherwise lawful investigative activities. To us, at least, it seems clear that the purpose of the enactment extends no further than to serve the orderly and efficient removal of trash by the waste collection department." State v. Brown. 20 Ohio App.3d 36, 484 N.E.2d 215, 218 (1984).

Consistent with the view that such ordinances are not intended to enhance privacy, there is no evidence here that respondent relied upon or even knew of any ordinance on which to base a privacy expectation. See United States v. Vahalik, 606 F.2d 99, 101 (5th Cir. 1979).

Respondent's claim lacks any roots in "concepts of real or personal property law or understandings that are recognized and permitted by society." Rakas v. Illinois,

439 U.S. 128, 143-144, n.12 (1978). Respondent does not take issue with his abandonment of the trash "in a personal property sense." See Pet. Oppo.: 22. And the argument that society recognizes a partial expectation of privacy from police examination of trash placed for collection outside the curtilage until it loses its "identity" is mistaken.

First, it makes no sense to say that respondent abandoned his trash in the strict property law sense to the government but that he reasonably expected the government not to notice that trash. "Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was unreasonable." United

States v. Reicherter, 647 F.2d 397, 399 (3d Cir. 1981).[4/] Thus, if respondent did not discard and throw away his property in the essential act and with the intent of abandoning it, it is difficult to imagine precisely what it was doing in a trash bin.

Second, cessation of the claimed expectation of privacy from police when garbage loses its "identity by being mixed and combined" with other trash, People v. Krivda, 5 Cal.3d at 367, 96 Cal.Rptr. at 68, 486 P.2d at 1268, reflects an unsupportable view of the Fourth Amendment. Under this theory, garbage does not enjoy permanent Fourth Amendment protection; instead, refuse remains private only until

---

4. Abandonment is not dependent upon an individual's lack of concern for the ultimate placement or destination of a discarded item. The defendants in Hester v. United States, 265 U.S. 57 (1924) and Abel v. United States, 362 U.S. 217 (1960) assuredly hoped the items they threw away would not fall into the hands of the government since they had not lost their identity. Nevertheless, this Court found the items were abandoned.

its commingling makes the task of gathering evidence difficult and unpleasant for the police. Whether or not one's trash will lose its identity and evidentiary utility before commingling cannot be reliably predicted at the time it is discarded. It is not a reasonable expectation of privacy that depends as much upon chance as upon the Constitution.

To avoid this conceptual embarrassment, proponents of the commingling theory urge that if the police feel that the cake is worth the candle, the legality of their subsequent sifting turns on whether the item discovered has evidentiary value, i.e., identity. If it does, they argue, the police have "searched" because the trash was not sufficiently commingled; if nothing of evidentiary significance is found because the trash was adequately commingled, the police may have looked long and hard but they have not "searched." This theory thus

resurrects the rejected notion that the legitimacy of government's action should depend on what turns up. See United States v. Jacobsen, 466 U.S. 109, 144 and n.9 (1984) (cases cited).

Sifting a garbage can is undoubtedly an unpleasant task. Its unwholesomeness is its own self-regulating limitation as a technique of police surveillance. By the same token, it is precisely because garbage cans are not where we keep valued things that they lack association with personal privacy except in the home or curtilage as an adjunct of the family economy.

This limitation arises not so much from the need to protect garbage as the need to protect people in the home and curtilage from police entry. When trash is placed for collection, or is removed by the authorized collector from within the curtilage, it passes into a categorically different and far more public sphere where access by others is uncontrolled and any

privacy expectations in castaway property evaporate. Since respondent placed his garbage outside the curtilage for collection, any expectation of privacy was not protected by the Fourth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted the judgment of the California Court of Appeal should be reversed.

DATED: November 26, 1986

JOHN K. VAN DE KAMP,
Attorney General of California

STEVE WHITE
Chief Assistant Attorney General

THOMAS A. BRADY, Supervising
Deputy Attorney General

LAURENCE K. SULLIVAN
Assistant Supervising Deputy
Attorney General

Counsel for Amici Curiae

LKS/la